IN THE

Supreme Court of the United States

OCTOBER TERM 1945

No. 37

ORDER OF RAILWAY CONDUCTORS OF AMERICA, H. W. FRASER, President Thereof, *et al.*,
Petitioners,

v.

SHELTON PITNEY and WALTER P. GARDNER, Trustees of Central Railroad Co. of New Jersey, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR BROTHERHOOD OF RAILROAD TRAINMEN, ET AL., INTERVENORS-RESPONDENTS

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October 1945.

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Opinions Below

The opinion of the District Court appears at R. 50-52. The District Court's decree appears at R. 52-54. The opinion of the Circuit Court of Appeals is reported in 145 F. (2d) 351 and appears at R. 56-60. Order amending opinion by inserting the word "road" for the word

"yard" appearing in the second line of the last paragraph at R. 59 was entered in the Circuit Court of Appeals (R. 77).

Jurisdiction

The judgment of the Circuit Court of Appeals was entered September 25, 1944 (R. 61). The petition for certiorari was filed on February 16, 1945, and was granted on June 18, 1945. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended.

Statutes Involved

The Railway Labor Act, as amended (45 U.S.C., Section 151, *et. seq.*) and Section 77 of the Bankruptcy Act (11 U.S.C., Section 205), the pertinent provisions of which are set forth in the Appendix to the brief for petitioners.

Questions Involved

(1) Have Yard Conductors for whom the Brotherhood of Railroad Trainmen Union is the accredited representative under the Railway Labor Act the exclusive right to man and operate drills within the switching limit boundaries of the Elizabethport Yard?

(2) Could the "carrier" by the agreement of March 7, 1940 with the Order of Railway Conductors to which the Brotherhood of Railroad Trainmen was not a party bind the Brotherhood of Railroad Trainmen or affect the rights of the Yard Conductors for whom it is the accredited representative?

(3) Does the agreement between the carrier and Brotherhood of Railroad Trainmen dated March 6, 1943 and the agreement between the carrier and the Order of Railway Conductors dated March 7, 1940 "change working conditions"?

(4) Had the U. S. District Court jurisdiction to determine a labor dispute where another remedy has been created by Congress?

(5) Assuming that this court is of the opinion that the Circuit Court of Appeals erred in holding that the District Court was without jurisdiction to hear and decide this matter, is the determination of the Circuit Court of Appeals on the merits *obiter dictum*?

Statement and Summary of Argument

The petition in this cause was filed by the Order of Railway Conductors of America, a voluntary unincorporated association and a railway labor union, international in scope, H. W. Fraser, President thereof, and Grover C. Apgar, General Chairman of the General Committee of Adjustment on the Central Railroad Company of New Jersey for the Order of Railway Conductors of America (R. 1-11).

In said petition the trustees of the Central Railroad Company of New Jersey in reorganization proceedings in the United States District Court for the District of New Jersey were made respondents. Upon the filing of the petition an order to show cause was issued (R. 11-12). Upon the return of the order to show cause the trustees of the carrier filed a full and complete answer setting forth in detail all of the facts in the matter. (R. 13-24).

In their answer the trustees recommended that the District Court dismiss the petition without prejudice to the O.R.C. to proceed to file a claim with the National Railroad Adjustment Board in the manner provided by the Railway Labor Act (R. 18-19).

By leave of the District Court the Brotherhood of Railroad Trainmen, a voluntary unincorporated association and a railway labor union, international in scope, W. L. Reed, Vice-President thereof, and Dennis A. Giles, Chairman of the General Grievance Committee on the Central Railroad of New Jersey for the Brotherhood of Railroad Trainmen were permitted to intervene and filed an answer to the petition (R. 25-29), which answer raised jurisdictional questions (R. 28, Pars. 8-9).

We will in this brief refer to and designate the respective parties as follows: The petitioners, Order of Railway Conductors of America, et al., as the "O.R.C."; the trustees of the Central Railroad Company of New Jersey, respondent, as the "carrier"; the intervenors, Brotherhood of Railroad Trainmen, et al., as the "B. of R. T."

This is a jurisdictional dispute between two railway labor unions presenting the issue as to whether five railroad drills within the switching limit boundaries of the Elizabethport Yard of the carrier shall be manned by road conductors or yard conductors.

The petitioner, O.R.C., is the accredited representative under the Railway Labor Act of road conductors in road service of the carrier. The intervenor, B. of R. T., is the accredited representative under the Railway Labor Act of yard conductors in the New York Harbor Terminal Territory Service which embraces the Elizabethport Yard of the carrier.

O.R.C. invoked the jurisdiction of the District Court by filing its petition praying for a final order permanently enjoining and restraining the carrier from violating an agreement dated March 7, 1940 entered into between the carrier and the O.R.C. By said agreement it was agreed that "After March 25, 1940 Road Conductors will perform all conductors' service Morses Creek and south on the Perth Amboy branch" (R. 6). The O.R.C. based its right to relief upon a paragraph in said agreement reading as follows: "No other change from the present method of assigning conductors to service operated in the territory described in the preamble hereof, will be made except by agreement between the parties hereto" (R. 6). The petition was filed fundamentally for the specific performance of this latter paragraph contained in the agreement. The O.R.C. based its alleged cause of action thereon to obtain an injunction restraining the carrier from proceeding under the agreement of March 6, 1943, effective March 16, 1943 (R. 21-24) entered into between the carrier and the B. of R. T. so far as it affects the aforementioned five drills within the switching limit boundaries of the Elizabethport Yard (R. 5).

An order of reference to Augustus C. Studer, Esq., the standing master appointed in this matter, was made (R. 29-30) and a full and complete hearing was had before the master, at which over five hundred pages of testimony were taken. The master filed an intermediate report, on the question of jurisdiction only, holding that the District Court had jurisdiction to entertain the petition and make a decision upon the merits (R. 30-35). To this intermediate report of the master exceptions were filed by both the O.R.C (R. 36) and the B. of R. T. (R. 37-38). The court being of the opinion that the argument of the exceptions

should be postponed until the filing of the final report of the master on the merits, referred the matter back to the master to make a final report on the merits (R. 38-39). The master filed his final report. The master in his final report found that under the basic agreement fixing the switching limit boundaries of the Elizabethport Yard the road conductors represented by the O.R.C. had the exclusive right to man crews of transfer runs south of Morses Creek, which is established as the southerly boundary of the switching limit boundaries of the Elizabethport Yard and that yard conductors represented by the B. of R. T. had the exclusive right to man crews of all switching drills north of Morses Creek including the five drills in question (R. 39-45).

On the hearing of exceptions filed by the O.R.C. to the final report of the master (R. 45-50) the District Judge filed an opinion affirming the report (R. 51-52). A decree was entered over-ruling the exceptions filed by the O.R.C. to the intermediate report and the final report of the master, ratifying and confirming the intermediate report and the final report of the master denying the relief prayed for in the petition of the O.R.C. a d dismissing it and directing the carrier to forthwith make effective and carry out the terms of the said agreement effective March 16, 1943 (R. 52-54).

From the decree of the District Court the O.R.C took an appeal to the Circuit Court of Appeals, which court after hearing oral argument handed down its opinion (R. 55-60). The Circuit Court of Appeals in its opinion held that the District Court was without jurisdiction to entertain the petition of the O.R.C. but that if the court was mistaken as to the question of lack of jurisdiction the road conductors were not entitled to prevail on the merits and entered its order decreeing that the order of the District Court be

vacated "and the proceeding is remanded to the said District Court for dismissal without prejudice to any action or proceeding not in conflict with the Railway Labor Act as amended" (R. 61). Petition for rehearing was denied (R. 62). This court granted a writ of certiorari to the Circuit Court of Appeals (R. 79).

ARGUMENT

I

There was no error in the determination of the Circuit Court of Appeals that the District Court lacked jurisdiction to hear and determine this controversy.

The B. of R. T. questioned the jurisdiction of the District Court over the subject matter of the petition of the O.R.C. upon the ground that it involved a labor dispute for which a remedy was provided by the Railway Labor Act, U.S.C.A., Title 45. The District Court held that it had jurisdiction and determined that on the merits the petition should be dismissed (R. 74-76). A decree was accordingly entered providing that the members of the B. of R. T. have the exclusive right to man the drills within the switching limit boundaries of the Elizabethport Yard, referred to in the petition of the O.R.C. and in the agreement effective March 16, 1943 between the Trustees of the Central Railroad of New Jersey and the Brotherhood of Railroad Trainmen, and dismissing the petition (R. 77-79). On appeal from this decree the Circuit Court of Appeals held that the District Court was without jurisdiction to hear and determine the matter and directed that the decree be

vacated and the proceedings be remanded to the District Court for dismissal without prejudice to any action or proceeding not in conflict with the Railway Labor Act as amended (R. 80-85).

It has been held by this court in three recent decisions that, where a remedy has been provided in labor disputes by the Railway Labor Act, such remedy is exclusive and that the District Court is without jurisdiction.

> *Switchmen's Union of North America, et al.* v. *National Mediation Board*, 320 U. S. 297;
> *General Committee of Adjustment, et al.* v. *Missouri-Kansas-Texas Railroad Company, et al.*, 320 U. S. 323;
> *General Committee of Adjustment, et al.* v. *Southern Pacific Company, et al.*, 320 U. S. 338.

It is contended by counsel for the O.R.C. in their brief that these cases have no application to the issue presented in this case (p. 11). In their brief below counsel for the O.R.C. cited these cases as authority that the federal courts under the Railway Labor Act and the Judicial Code have "original jurisdiction" of all "suits and proceedings arising under any law regulating commerce." While this court recognizes this general doctrine, Mr. Justice Douglas in the case of *General Committee, &c.* v. *Missouri, &c. Co., supra*, said at pages 337-338:

> "We are here concerned solely with legal rights under this federal Act which are enforceable by courts. For unless such a right is found it is apparent that this is not a suit or proceeding 'arising under any law regulating commerce' over which the District Court had original jurisdiction by reason of §24 (8) of the Judicial Code, 28 U.S.C.A. §41 (8)

> '(citing cases). When a court has jurisdiction it has of course 'authority to decide the case either way.' *The Fair* v. *Kohler Die & Specialty Co.*, 228 U. S. 22, 25, 57 L. ed. 716, 717; 33 S. Ct. 410. But in this case no declaratory decree should have been entered for the benefit of any of the parties. Any decision on the merits would involve the granting of judicial remedies which Congress chose not to confer."

In the *Switchmen's Union* case, *supra*, this court held that the specification of one remedy by Act of Congress to enforce rights created by it normally excludes another.

Counsel for petitioners in their brief at page 20 contend that the decision of the Circuit Court of Appeals is in conflict with the decision of the Second Circuit in *Burke* v. *Murphy*, 109 F. (2d) 572 (cert. den. 310 U. S. 635). That case involved the validity of an order of the District Court directing the receiver to retain fifteen per cent of the wages of the employees, such retained wages to constitute only general claims against the receivership. The court held that it was in effect a "wage cut." We are at a loss to determine what analogy this case has to the case at bar. In the case of *Burke* v. *Murphy*, *supra*, there was unquestionably a change in wages by the retention of 15% of the wages of the employees, such retained wages to constitute only general claims against the receiver. There was nothing like this in the case at bar. The effect of the agreement of March 6, 1943 was merely to protect the rights of the yard conductors represented by the B. of R. T. as established by the basic contract under the switching limit of boundaries of Elizabethport Yard as fixed by the agreement of 1929 in the same manner as the agreement of March 7, 1940 was entered into in order to protect the rights of road conductors. This agreement was consented to in writing by the O.R.C.

The case of *Peavy-Wilson Lumber Co. Inc.* v. *Loftin*, 131 F.-(2d) 579, cited by counsel for petitioners on page 16 of their brief, was not a dispute between two rival labor unions. In that case the lumber company, not a labor union, claimed that it had the right to provide crews for lumber company's trains.

At pages 27 and 50 of petitioners' brief reference is made to the letter of the National Mediation Board to the O.R.C. dated January 21, 1943 which quoted from a letter from the carrier to it wherein it was stated that the carrier had filed no notice of a desire to change the existing agreements nor did it propose to do so, and that the matter was a claim which under the Railway Labor Act is referable to the National Railroad Adjustment Board. As a matter of fact the existing agreements were not changed and the agreement of March 6, 1943 merely put into effect the rights of the respective Brotherhoods under the switching limits boundaries of the Elizabethport Yard which had been theretofore violated by the O.R.C.

Counsel for the O.R.C. contend in their brief at pages 23-27 that the determination by the Circuit Court of Appeals that the District Court lacked jurisdiction destroys any rights of the O.R.C. guaranteed by the Railway Labor Act. This is not and cannot be so.

It is true that under Section 6 of the Railway Labor Act (U.S.C.A. Title 45, Sec. 156) the National Mediation Board will not take jurisdiction unless the carrier gives thirty days notice of an intended change in agreements, etc. and that Board has been requested by either party to take jurisdiction.

It is, however, provided in Section 3(h) of the Railway Labor Act (U.S.C.A. Title 45, Sec. 153(h)):

"The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

"First division: To have jurisdiction over disputes involving train and yard service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees."

It is also provided in Section 3(i) of the Railway Labor Act (U.S.C.A. Title 45, Sec. 153(i)):

"The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act (June 21, 1934), shall be handled in the usual manner up to and including the chief operating offer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

The O.R.C. bases its right to relief upon a violation of the Railway Labor Act by the carrier in not giving thirty days notice as required by the statute.

In the letter written by the National Mediation Board to the O.R.C. (Exhibit P-12 quoted in the appendix to petitioners' brief at pp. 50-51) the Board quoted from a letter written to it by the carrier in which it was stated that the carrier had no intention of changing existing agreements.

As stated in the petitioners' brief the Board concluded this letter by referring to the quotation from the carrier's letter as follows:

> "From the above it does not appear that the carrier has as yet proceeded to carry out its intention and that when it does, your remedy is to make claim under your existing agreement,"

to wit: the filing of a claim with the National Railroad Adjustment Board.

Upon the argument in the District Court counsel for the O.R.C. stated that it did not wish to apply to the National Railroad Adjustment Board because it could get a speedier determination in the District Court.

As it stated in its foregoing letter to the National Mediation Board, the carrier in its answer contended that it did not change any agreements with the O.R.C. or the B. of R. T. but in displacing road conductors from manning crews of these five drills within the switching limit boundaries of the Elizabethport Yard merely put into effect its agreement with the B. of R. T. which had previously been violated by the O.R.C.

II

Yard conductors have the exclusive right to man and operate yard drills within the switching limit boundaries of the Elizabethport Yard.

The Standing Master so held on the merits; the District Court so held on the merits; and the Circuit Court of Appeals so held on the merits.

Counsel for petitioners contend that the Circuit Court of Appeals having determined that the District Court was without jurisdiction to hear and determine the controversy, its decision on the merits was *obiter dictum*. We submit that might be true if this court determines that there was no error in the decision of the Circuit Court of Appeals on the question of lack of jurisdiction. If, however, this court determines that the decision of the Circuit Court of Appeals on the question of lack of jurisdiction was erroneous then the District Court and the Circuit Court of Appeals had jurisdiction to determine the matter on the merits. In that event the determination of this court becomes the determination of the Circuit Court of Appeals and the situation would then be the same as though the Circuit Court of Appeals had held that the District Court had jurisdiction of the cause. Any question as to the determination of the Circuit Court of Appeals on the merits being dictum would then fall and its determination on the merits would have the same force and effect as though it had originally held that there was no lack of jurisdiction.

> "Where there are two grounds, upon either of which an appellate court may rest its decision, if it adopts both, the ruling on neither is obiter, and

each is the judgment of the court, and of equal validity with the other."

United States of America v. *Title Insurance & Trust Company*, 265 U. S. 472-487.

At page 486 Mr. Justice Van Devanter, writing the opinion of this court, said:

"* * * But it is urged that what we have described as ruled there was obiter dictum and should be disregarded, because the court there gave a second ground for its decision which was broad enough to sustain it independently of the first ground. The premise of the contention is right, but the conclusion is wrong; for where there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, 'the ruling on neither is obiter, but each is the judgment of the court, and of equal validity with the other.' Union P. R. Co. *v.* Mason City & Ft. D. R. Co., 199 U. S. 160, 166, 50 L. ed. 134, 137, 26 Sup. Ct. Rep. 19; Florida C. R. Co. *v.* Schutte, 103 U. S. 118, 143, 26 L. ed. 327, 336."

Until the institution of these proceedings the O.R.C. has since the establishment of the switching limit boundaries of the Elizabethport Yard recognized the right of yard men to man crews within the switching limit boundaries. The O.R.C. still recognizes this right of yard conductors to man all crews operating within the switching limit boundaries with the exception of the five drills here in question. As to these drills it contends that because of the fact that for many years prior to 1943 road conductors had manned these drills the rule as to yard conductors having the exclusive right to man these drills does not apply. An examination of the record and

appellants brief shows that were it not for this fact the O.R.C. would have no alleged basis for its contention that a different rule would apply to these drills than to the other drills within the yard switching limit boundaries. The O.R.C. did not below nor here show any other basis for such contention. Counsel for the O.R.C. in their brief apparently contend that the establishment of yard switching limit boundaries has nothing to do with the defining of yard service and road service and the respective rights of yard men and road men. They assert no other reason for the establishment of yard switching limit boundaries and in fact the evidence is all to the effect that the purpose of the establishment of yard switching limit boundaries is to define the limits of the yard service and of road service *and to establish a line of demarcation between them.*

By the switching limit boundaries of the Elizabethport Yard as fixed by the carrier established in 1929 and which were acquiesced in by both the O.R.C. and B. of R. T., Morse's Creek was fixed as the southerly boundary of the yard switching limits.

The O.R.C. contended and in the agreement of March 7, 1940 between the carrier and the O.R.C. recognized that Morse's Creek was the southerly boundary of the Elizabethport Yard switching limits and that all runs south of Morse's Creek were road service.

The B. of R. T. contended and in the agreement of March 6, 1943 recognized that Morse's Creek was the southerly switching limit boundary of the Elizabethport Yard and that switching drills in the yard north of Morse's Creek constituted yard service.

The First Division National Railroad Adjustment Board, which meets in Chicago and which has jurisdiction

here, in the consideration of the switching limit boundaries of the Elizabethport Yard of the carrier, in its Award #7830, Docket #10018, dated March 10, 1943, Trustees' Exhibit 1, found as follows:

> "Elizabethport is a closed yard for yard men and yard men holding seniority in that yard were entitled to be used in the performance of the work train service in question operating exclusively within the switching limits instead of road men and claim in this respect is valid to be effective from date of this award."

This same board in its Award #3633—Docket #20104, dated March 28, 1939, Trustee's Exhibit 14 (which has reference to the Baltimore & Ohio Railroad Company, Buffalo Division) found as follows:

> "* * * If (road crew) may also be required to double its train where one track will not hold the whole train. It may not be required to do any other switching. Doubling is in fact (switching) but is not considered such under the rule where the double is necessary for lack of track room. Any other double, for convenience, is switching and, therefore, yard work. At intermediate points a through train may not be required to do other than make straight set-offs or pick-ups. If, in order to do so, switching is necessary and a yard crew is maintained it is yard work."

Mr. Frank James Williams, the Vice-President of the O.R.C. in charge of this territory was a member of the board of adjustment at the time of making the above awards and still is a member of that board.

Mr. Williams, called as a witness for the O.R.C., testified (Rec. of App.; C.C.A., pp. 407-408)[1] as follows:

> "Q. What is the purpose of the establishment of switching limits. Do you know? A. What is the purpose?
>
> Q. Yes. A. The purpose of establishing switching limits is to define the limits where Articles, 28 of the Trainmen's agreement, or 34 of the Conductors' agreement, would designate where men assigned to yard service would be privileged to operate.
>
> Q. In other words, as a demarcation line it shows the difference between yard switching limits and the road service, the road service? A. That's right; you are right about that."

Mr. F. M. Falck, Assistant Vice-President of the carrier in charge of personnel and of labor disputes, testified (Rec. of App.; C.C.A., p. 149) that this dividing line has come to be recognized generally as switching limits; that road men cannot perform work within switching limits that yard men should not perform work outside of switching limits, but that yardmen are entitled to work within the switching limits and that rulings of the Adjustment Board and claim cases filed and decisions given, a number of them right here on the Central Railroad of New Jersey, recently, yard men are entitled to work within the switching limits and roadmen outside.

Petitioners contend that because of there being no companion rule relating to roadmen to Rule 28 of the

1. As stated before, voluminous testimony was taken before the Special Master. This testimony was not printed but a typewritten transcript was filed with the Clerk of the Circuit Court of Appeals and constituted a part of the record on appeal. We are advised that this typewritten transcript of the testimony is on file with the clerk of this court. In making reference thereto we will refer to it as "Rec. of App., C.C.A."

B. of R. T. and Rule 34 of the O.R.C., therefore, there is no rule which prohibits roadmen from operating within switching limits. To carry this argument to its logical conclusion would mean that there would be absolutely no point in fixing switching limit boundaries of the Elizabethport Switching District. The record and the testimony of Mr. Falck and Mr. Williams shows that the purpose of the fixing of switching limits is to show the line of demarcation between yard switching service and road service. That is the sole purpose. By Rule 28 of the B. of R. T. and Rule 34 of the O.R.C. it is merely provided that yardmen in the case of an emergency may be used in road service. There is no rule which permits roadmen to be used in yard switching service even in the case of an emergency and, therefore, the carrier has absolutely no right to use them in yard switching service at any time. To follow counsel's argument we would in addition have to cast aside the awards of the National Railroad Adjustment Board, Division #1, of which, as stated before, Mr. Williams is a member, which recognizes the exclusive right of yardmen to man crews within the switching limits of the New York Harbor Terminal territory, including the Elizabethport Yard. We have heretofore referred to and quoted from Award #7830 of the National Railroad Adjustment Board, Division #1, recognizing this fact and holding that "Elizabethport is a closed yard for yardmen, etc."

Prior to the promulgation of supplement #16 to General Order #27, during the period of government control of railroads and World War #1, it had been the practice to pay yard crews when used in road service one minimum day's pay at road rates. As the result of granting of time and a half for yard service employees, which oc-

curred with the rendition of supplement #16 to General Order #27, the carrier and organization representatives agreed to what was then and is now generally known as Article 20, Section B, of Supplement #16 of General Order #27, which article #20 becomes rules 28 and 34 in the B. of R. T. and O.R.C. contracts respectively.

Notwithstanding the contention of counsel for the O.R.C., Division #1 of the National Railroad Adjustment Board has always construed road and yard work to be two separate and distinct classes of service, and when road men or road crews perform services within the confines of yard switching limits, such service whether it be an emergency matter or otherwise, in every instance carries with it penalty payments provided for under compensatory rules applicable to yard men.

The Circuit Court of Appeals fully considered the case on its merits and, with a clear and concise statement of the facts, held that there is no basis for the contention that the road conductors have the right to man these drills which lie within the switching limits of the yard and that the road conductors are not entitled to prevail on the merits (R. 59-60, as amended R. 77).

III

The agreement between the carrier and B. of R. T. of March 6, 1943, effective March 16, 1943, did not change working conditions.

It is contended by counsel for the O.R.C. that this agreement violated the following federal statutes:

(a) U.S.C.A. Title 45, Sec. 156; and

(b) U.S.C.A. Title 11, Sec. 205 (n).

Counsel for the O.R.C. in the appendix to their brief set forth what they contend are the pertinent provisions of the aforesaid statutes (pp. 42-50). The District Court held that the agreement of March 6, 1943 did not change working conditions and, therefore, did not violate the federal statutes in this respect. In considering the meaning of the words "working conditions" as used in the aforementioned statutes the Standing Master quoted from "Words and Phrases, 1940, Vol. 45", under the heading "Working Conditions", page 501, and the opinion in the case of *Missouri Pacific R. R. Co.* v. *Norwood*, 42 Fed. Rep. (2d) 765, 773 (R. 35).

The Circuit Court of Appeals held that the proposed displacement of road conductors with yard conductors did involve a change in working conditions within the sweep of the Railway Labor Act and that the remedies prescribed by that act were exclusive (R. 59).

We submit that the determination of the District Court that there was no change in working conditions was correct. In the event, however, that the Circuit Court of Appeals was correct in determining that there was a change in working conditions then the O.R.C. has its remedy under the Railway Labor Act.

We further submit that if it could possibly be determined that the agreement of March 6, 1943 was vulnerable in this respect as being in violation of the provisions of the foregoing statutes, then the agreement of March 7, 1940 between the carrier and the O.R.C. is vulnerable in the same respects. Counsel for the O.R.C. contended below that while the agreement of March 6, 1943 between the carrier and the B. of R. T. is invalid because it changes working conditions that the agreement of March 7, 1940 between the carrier and the O.R.C. does not change

working conditions and, therefore, is not invalid. We are frank to say that we cannot understand the diametrically opposite positions counsel take in a consideration of each of the agreements which agreements to our minds are of an exactly similar nature.

The agreement of March 7, 1940 was entered into for the purpose of correcting a situation where for years the B. of R. T. had with its yard conductors manned transfer runs south of Morse's Creek and outside of the yard switching limit boundaries which transfer runs road conductors were entitled to man as being within road service. The agreement of March 6, 1943 was entered into for the purpose of correcting a situation where for just as many years the G.R.C. had with its road conductors manned switching drills north of Morse's Creek and within the Elizabethport Yard switching limit boundaries.

See testimony of the following witnesses produced on behalf of the B. of R. T.:

Cavicchia, who was displaced as a result of the agreement of March 7, 1940 (Rec. of App., C.C.A., pp. 487-490);

Anthes, who testified that the transfer runs south of Morse's Creek were manned by yard conductors right up until 1940 (Rec. of App., C.C.A., pp. 497-498);

Tiernan, who testified that he had always considered switching limits as Morse's Creek (Rec. of App., C.C.A., pp. 498-499);

Freer, who testified that he operated as a yard brakeman or yard conductor from 1912 to 1935 on transfer runs south of Morse's Creek and in 1935 he was displaced on these transfer runs by another yard conductor (Rec. of App., C.C.A., pp. 500-502);

Woltman, Secretary of the General Committee of the B. of R. T. on the Central Railroad; who testified that at or just prior to the entering into of the agreement of March 7, 1940 he sent a protest to the management against the permitting of road conductors to man the drills in question within the switching limits of the Elizabethport Yard (Rec. of App., C.C.A., pp. 502-509, Exhibit Resp. 2).

In fact it was conceded by counsel for the O.R.C. that yard conductors had for many years prior to the entering into of the agreement of March 7, 1940 been manning these transfer runs south of Morse's Creek and outside of the Elizabethport Yard switching limit boundaries which they alleged constituted road service and the reason for the entering into of that agreement was to correct this situation.

Contentions of the O.R.C. as to the alleged invalidity of the agreement of March 6, 1943 apply equally to the agreement of March 7, 1940.

(a) Counsel for the O.R.C. contends that the agreement of March 6, 1943 is clearly in violation of U.S.C.A., Title 11, Sec. 205, 77 (n) insofar as it affects the Bayway and Standard Oil Drills. They base their contention that the agreement of March 6, 1943 changed working conditions upon the fact that it will oust road conductors from runs which they have held continually for a period of forty years. In this respect, likewise, the agreement of March 7, 1940 ousted yard conductors from transfer runs south of Morse's Creek which they had held continually for a like period of time.

(b) Counsel for the O.R.C. contend that the agreement of March 6, 1943 is in violation of the Railway Labor

Act, U.S.C.A., Title 45, in that the thirty day notice required by Section 156 was not given. In this respect there was no thirty day notice in accordance with the Railway Labor Act given of the entering into the agreement of March 7, 1940.

(c) Counsel for the O.R.C. contend that the agreement of March 6, 1943, so far as it relates to said road drills, is a distinct violation of the Railway Labor Act. That each labor union has a right to represent its own members and to bargain in their interest. That it has no right to bargain away the rights of the members of another union.

In the first place, the agreement of March 6, 1943 does not relate to road drills but merely to *yard* drills within the switching limit boundaries of the Elizabethport Yard.

In the second place, the same argument applies as to the agreement of March 7, 1940. The carrier and the O.R.C. had no right to bargain away the rights of the members of the B. of R. T. The B. of R. T. was not a party to the agreement of March 7, 1940 and the rights of its members can in nowise be affected thereby.

(d) Counsel for the O.R.C. contends that the seniority rights of road conductors were affected by the agreement of March 6, 1943.

We question the statement that any seniority rights of road conductors were affected by the agreement of March 6, 1943. But if they were, then to exactly the same extent were the seniority rights of yard conductors who had for forty years been manning the transfer runs south of Morse's Creek affected by the agreement of March 7, 1940 affected.

Mr. Williams on the witness stand attempted to interpret Rule 42 of the O.R.C. (Exhibit T-1) in support of his contention that there was no provision in said rule which provided for the protection of the seniority of road conductors in a situation of this kind. The rule of the B. of R. T. protecting seniority rights is No. 64 (Exhibit T-9). Mr. Williams could not point out any greater protection that yard conductors had under Rule 64 of the B. of R. T. than road conductors had under Rule 42 of the O.R.C. A reading of both rules shows that there is no substantial difference.

Under these rules a yard conductor or a road conductor who is displaced has the right to claim his seniority in bidding for or selecting runs over his next junior in rank and so on down the line.

The longest any of the road conductors who were taken off the yard drills had worked on these drills was three or four years (Rec. of App., C.C.A., p. 235). We merely mention this to show that the effect of the agreement of March 6, 1943 would not be to have men who had worked thirty-five years on particular drills thrown out of a job. *Mr. Williams, a Vice-President and member for many years of the O.R.C., could not cite any case where a road conductor who had been displaced in a situation of this kind had lost his seniority rights.*

As a matter of fact we are advised that the road conductors who were displaced by yard conductors, after the entry of the decree below, in pursuance with the agreement of March 6, 1943, have been permitted under their seniority rights under Rule 42 of the O.R.C. to replace junior road conductors. *We feel that counsel will concede this to be the fact.*

(e) Counsel for the O.R.C. contend that the road conductors had the right to continue to man these five drills

because of custom, to wit: that road conductors had manned these drills for a long number of years.

Likewise, if that be so then the yard conductors had the right to continue to man the transfer crews from which they were displaced by the agreement of March 7, 1940 by custom, to wit: that yard conductors had manned these transfer runs for a long number of years.

(f) Counsel for the O.R.C. based its right to relief on the fact that for a long period of years the B. of R. T. did not question the right of road conductors to man the drills in question within the yard switching limit boundaries. There is no testimony to support any contention that the B. of R. T. *by any affirmative act* granted or acquiesced in any such right. The most that can be said from the record is that for a long number of years the road conductors were permitted to man these switching drills without formal protest on behalf of the B. of R. T. Likewise, it is just as outstanding and significant a fact that the O.R.C. permitted the transfer crews south of Morse's Creek to be manned for a long number of years by yard conductors without formal protest on behalf of the O.R.C.

We might also refer to the fact that the road conductors only manned the Standard Oil Drills since November 19, 1925. Up until that time the drills had been manned by the Standard Oil's own employees (Lander—petitioners' witness (Rec. of App., C.C.A., p. 450)).

(g) Counsel for the O.R.C. contends that in consideration of the entering into of the agreement of March 7, 1940 the O.R.C. withdrew certain claims that it had made. *Certainly none of these claims related to any rights the O.R.C. alleged it had been deprived of in respect to the five yard drills in question for actually the road conductors*

up to that time had been permitted to man these drills which they actually were not entitled to man. The agreement of March 6, 1943 states specifically that the B. of R. T. agrees to withdraw pending claims. Mr. Falck testified (Rec. of App., C.C.A., p. 229) that these claims were substantial in amount in that they amounted to thousands of dollars and that they were withdrawn in consideration of the entering into of the agreement of March 6, 1943 in exactly the same manner as certain claims of the O.R.C. were withdrawn when the agreement of March 7, 1940 was entered into.

IV

The rights of the B. of R. T. to have the yard drills in question manned by yard conductors created by its basic collective bargaining agreement could not in anywise be affected by an agreement entered into between carrier and the O.R.C. to which the B. of R. T. was not a party.

On this point we feel that nothing need be added to the opinion of the Circuit Court of Appeals wherein that court said:

> "* * * The purpose of establishing the boundaries of the yard was to fix a line of demarcation between road service and yard service. It was to designate a line beyond which yard conductors should not go, and inside of which road conductors should not work, except in cases of emergency. But despite the establishment of the yard limits, there was a certain amount of overlapping. Among other instances, road conductors manned the five drills in question, and yard conductors manned certain transfer runs which extended south of Morse's Creek and therefore outside of the switching limits of the yard. The

O.R.C. protested against yard conductors manning the transfer runs south of Morse's Creek, contending that the work belonged to road conductors. As the result, the carrier and O.R.C. entered into an agreement in 1940 which provided that after a certain date road conductors should perform all service south of Morse's Creek on the Perth Amboy Branch. The B.R.T. was not a party to that agreement. When yard conductors were displaced with road conductors on the transfer runs, B.R.T. urged that road conductors be taken off the Bayway and Standard Oil drills. In consequence (fol. 87), the carrier and B.R.T. entered into an agreement in 1943 which provided that effective on a certain date yard conductors should man the Bayway and Standard Oil drills. The O.R.C. was not a party to that agreement. Since the carrier and both Brotherhoods did not join in either of these two agreements, neither of them operated to take from the Brotherhood not a party to it and vest in the other any rights created by the basic collective bargaining agreements, or the rights arising out of the establishment of the limits of the Elizabethport yard. There is no basis for the contention that road conductors have the right to man these drills which lie within the switching limits of the yard."

Conclusion

While the testimony taken before the standing master is voluminous we submit that the issue involved is very narrow and confined. This litigation concerns the respective rights of the two railway labor unions and their members. The petitioner, O.R.C., represents "road conductors", to wit: conductors entitled to man crews operating outside of the switching limit boundaries of the Elizabethport Yard. The intervening respondent, the B. of R. T., represents "yard conductors", to wit: conduc-

tors entitled to man crews operating within the switching limit boundaries of the Elizabethport Yard.

Switching limit boundaries of the Elizabethport Yard were fixed and determined by the management of the railroad carrier in 1929 and were acquiesced in and consented to by the four brotherhood unions, including the O.R.C. and the B. of R. T. *An instance of what we submit was the unfair attitude taken by the O.R.C. throughout these proceedings* is the fact that at first upon the taking of testimony before the master the O.R.C. and its counsel contended that there had been no consent to the establishment of the switching limit boundaries of the Elizabethport Yard given by it. However, the written consent by the O.R.C. was subsequently produced from the files of the carrier and *it is now conceded that the switching limit boundaries of the Elizabethport Yard as so established were consented to by the O.R.C.* In addition, in the agreement of March 7, 1940 between the carrier and the O.R.C., upon which the O.R.C. bases its petition, "Morse's Creek" was recognized by the O.R.C. as being the line of demarcation between yard switching limits and road service. In fact, the O.R.C. based its claim to have road conductors man crews south of Morse's Creek upon the fact that any runs south of Morse's Creek were outside of the yard switching limits.

The evidence shows that the sole purpose of establishing yard switching limit boundaries is to indicate the line of demarcation between yard switching service and road service. Except for the contentions made by the O.R.C. on this application it has and does recognize that yard conductors have the right to man switching crews within yard switching limits while insisting that the O. R. C. has the right to have road conductors man crews outside of the yard switching limits.

The dispute here presented arose solely from the fact that both the O.R.C. and B. of R. T. for many years made no protest as to violations committed by each of them. For many years road conductors manned the Bayway and Standard Oil switching crews. For approximately just as many years, yard conductors manned certain transfer runs operating south of Morse's Creek and outside of the yard switching limits. Upon the O.R.C. protesting against yard conductors operating outside of yard switching limits the agreement of March 7, 1940 was entered into between the trustees and the O.R.C. The B. of R. T. was not a party to this agreement. Thereupon, and in fact prior to the entering into of this agreement, the B. of R. T. protested against the operation by road conductors of the switching drills in question within the switching limit boundaries of the Elizabethport Yard. This resulted, after investigation, in the recognition of this claim by the management and in the entering into of the agreement bearing date March 6, 1943 correcting the aforementioned violations.

The master correctly found that the agreement of March 7, 1940, insofar as it gave to the road conductors the right to perform all services south of Morse's Creek, was a recognition of their right to do so founded upon their basic agreement with the carrier and the agreement as to the switching limit boundaries of the Elizabethport Yard. He also correctly held that the same can be said of the agreement bearing date March 6, 1943, effective March 16, 1943 between the carrier and the B. of R. T. insofar as the rights of the members of that union are concerned with reference to operations within the yard switching limits (R. 43-44).

The O.R.C. claims that it is not bound by the agreement of March 6, 1943 because it was not a party thereto,

while at the same time and in the same breath it strenuously asserts that the agreement of March 7, 1940 is binding upon the B. of R. T. *although it was not a party thereto.* Counsel for the O.R.C. claim that the agreement of March 6, 1943 is in violation of the rights of the O.R.C. upon many grounds. As we have heretofore pointed out, if it could possibly be determined that any of the grounds of attack by the O.R.C. against the validity of the agreement of March 6, 1943 are tenable, then the agreement of March 7, 1940 is just as vulnerable in these respects as violating the rights of the B. of R. T.

The agreement of March 7, 1940 recognizes the rights of the road conductors to man crews south of Morse's Creek and outside of the yard switching limit boundaries; likewise the agreement bearing date March 6, 1943 recognizes the rights of the yard conductors to man crews within the switching limit boundaries.

In his report the master concludes:

> "Until the agreement effective March 16, 1943 was executed with the Brotherhood of Railroad Trainmen the Order of Railway Conductors of America enjoyed rights within the switching limits to which it was not entitled. Except as just stated, the agreement of March 7, 1940 remains in full force and effect, but it furnishes the petitioner no ground upon which to base their claim or the relief sought by them in their petition" (R. 44).

In his opinion confirming the master's report Judge Fake said:

> "The master has found as a fact that the dividing line between the operators of these two Unions is fixed by the switching limits and that road men should not perform work within switching limits and yard men should not perform work outside switching limits."

The Circuit Court of Appeals affirmed the findings of the Standing Master and the District Court on the merits. We submit that these findings were absolutely justified by the evidence in this cause and that if it be determined that the District Court had jurisdiction of this controversy these findings should be affirmed by this court.

We respectfully submit that in the event that this court decides that the Circuit Court of Appeals was correct in determining that the District Court lacked jurisdiction in this matter the order of that court vacating the order of the District Court and remanding the proceedings to the District Court for dismissal without prejudice to any action or proceeding not in conflict with the Railway Labor Act as amended should be affirmed.

We further respectfully submit that in the event that this court decides that the decision of the Circuit Court of Appeals that the District Court was without jurisdiction to consider this controversy, then the decision of the Circuit Court of Appeals in determining this cause on the merits should be affirmed and that court be instructed to direct an affirmance of the decree of the District Court.

Respectfully submitted,

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ROBERT CAREY,
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Of Counsel.

October 1945.